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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 663.

EDWARD GAY, JR., Receiver of the SAVANNAH AND ATLANTA RAILWAY, *Petitioner*,

vs.

MAJOR RUFF, *Respondent*.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT, IN OPPOSITION.

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT, IN OPPOSITION.

Opinions of the Court below.

The opinion of the District Court will be found on pages 11 to 16 of the Record and is reported in 3 Fed. Supplement 264.

The opinion of the Circuit Court of Appeals is fully set out in pages 25-30 of the Record, but has not yet been reported.

Jurisdiction.

The jurisdiction of this Court to review the ruling of the Circuit Court of Appeals is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U. S. C. A. Sec. 347(a).)

The jurisdiction of this Court to review the judgment complained of is, however, challenged by respondent.

The judgment which is sought to be reviewed by the writ of Certiorari is a judgment of the Circuit Court of Appeals of the Fifth Circuit, reversing the United States District Court of the Southern District of Georgia for denying a motion to remand to the State Court, a certain cause pending in the District Court in which respondent was plaintiff and petitioner was defendant.

In the District Court the Motion of respondent to remand the case to the Court was state denied, but upon appeal to the Circuit Court of Appeals the judgment of the District Court was reversed with direction to set aside the order of dismissal in the District Court, and to remand the case to the State Court.

This petition for certiorari seeks to review that ruling in this Court, and we respectfully insist that such a review is forbidden by statute.

"The Statute provides, 'whenever any cause shall be removed from any State Court into any District Court of the United States and the District Court shall decide that the cause was improperly removed and order it to be remanded to the State Court from whence it came, such remand shall be immediately carried into effect and there shall be no appeal or writ of error from the decision of the District Court, 28 U. S. C. A. Section 71.

This statute, in terms, applies to all cases removed from the state courts.

Argument on the jurisdiction.

Under the plain terms of the Statute, and under repeated rulings of this Court an order remanding a case to the State Court is not subject to review, directly or indirectly, but is final and conclusive.

28 U. S. C. A. Section 71.
Missouri Pacific R. R. Co. v. Fitzgerald, 160 U. S. 556, 580, 583.
McLaughlin Bros. v. Hollowell, 228 U. S. 278, 286.
Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 447.
Yankaus v. Feltenstein, 244 U. S. 127.
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In re Matthew Addy Steamship & Commerce Corporation, 256 U. S. 417.

It being conceded that no appeal could have been taken, by any method, from the granting of a motion to remand by the District Court, petitioner in this case is driven to the position that an appeal is possible when the order of remand is granted by the Circuit Court of Appeals, on appeal from its refusal in the District Court. (Brief for Petitioner, pp. 12, 13.) That precise contention has however been expressly denied by this Court.

German National Bank v. Speckert, et al., 181 U. S. 926.

To quote from the language of Mr. Justice Gray in the case cited *supra*:

"In the present case the remand to the State Court was denied by the Circuit" (now District) "Court of the United States but, on appeal from the decree dismissing its bill, was ordered by the Circuit Court of Appeals."

"If the Circuit" (now District) "Court had ordered the case remanded its order could not, according to the decisions above cited, have reviewed by this Court, *in any manner*, either by appeal from that Court, or by Mandamus to that court, or by writ of Error to the State Court."

"It would be an extraordinary result if while an order to remand by the Circuit" (now District) "Court is not subject to review *in any form*, an order of remand by that Court, by direction of the Circuit Court of Appeals were subject to a further appeal to this Court."

In the German National Bank case, *supra*, the review was sought by an appeal from the judgment of the Circuit Court of Appeals, and, of course, before the mandate of the Circuit Court of Appeals had been sent down to the District Court, or executed therein.

In the German National Bank case, and in the several cases cited therein it seems to us, that the judgment of the Court rested not on one but on two propositions, first, that the order of remand was not a "final judgment," from which an appeal could be taken under the provisions of the Act of March 3, 1891, and, second, that there could be no review of an order remanding a case to the State Court, on account of the statutory provision "such remand shall be immediately carried into execution." The recent certiorari acts do not touch the second proposition.

The Writ of Mandamus lies before "final judgment," and yet this Court has uniformly held that Writ does not lie to require a District Court to retain jurisdiction of a case that it had ordered remanded to the State Court, and that it does not lie because of the statutory provision that "such remand shall be immediately carried into execution."

> Re Pennsylvania Co., 137 U. S. 451.
> In re Matthew Addy & Co., 206 U. S. 417, and authorities cited.

In the case of Pennsylvania Co., *supra*, Mr. Justice Bradley, after quoting the Act of 1887, said:

> "In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule that the abrogation of one remedy does not affect another. But in this case we think it was the intention of Congress to make the judgment of the circuit court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the Federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal if the writ of man-

> damus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the word 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy, *by whatever process*. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error." 137 U. S. 151, 34 L. ed. 740, 11 Sup. Ct. Rep. 112.

We can only add to this the observation that the argument is equally strong against a review by certiorari.

Petitioner urges that the Act of March 13, 1911, and of February 13, 1925, establishing the present certiorari practice "greatly alters and enlarges this Court's jurisdiction on certiorari."

While in a sense that may be true, in that it authorized this Court to bring up on certiorari all cases embraced in the Acts, "before as well as after a judgment or decree of the lower court," yet the main purpose of those acts was to restrict and narrow the right of appeal by abolishing appeal and writ of error from the lower courts, except in cases where the same was allowed by special statute, and to allow but not require the supreme court to bring up on certiorari such cases and only such cases as had been previously coming up, as a matter of right, either upon appeal or writ of error.

Such was the purpose of the Act of 1925, as was fully set forth by several distinguished members of this Court in the Hearings before the Subcommittee of the Senate Committee on the Judiciary, 68th Congress, First Session, on the bills S. 2061 and S. 2062.

That the purpose or effect of this legislation was to confer jurisdiction upon this Court to review cases in which

the right of review was expressly denied by statute is both unreasonable and unthinkable. Nor did these two acts repeal, by any sort of implication, the provision of the acts of 1887 and 1888 specifically denying review of the action of lower Court in remanding cases to the State Courts.

The rule against repeal by implication is especially applicable where the prior law is a special Act relating to a particular case or class of cases and the subsequent law is general in its terms and application.

> Petri v. Creelman Lumber Co., 199 U. S. 487, 497.
> Rodgers v. U. S., 185 U. S. 83, 87, 88.

The mere fact that one statute is special and the other general creates a presumption that the special is to remain an exception to the general.

> Washington v. Miller, 235 U. S. 422, 428.

The test of what is meant by special and general acts, within the scope of the above rule is not a narrow one and in many instances both acts were general statutes, one with a broader application than the other.

> Rodgers v. U. S., 185 U. S. 83, 88, 89.
> Ex Parte, U. S., 226 U. S. 420, 424.
> U. S. v. Greathouse, 166 U. S. 601.
> U. S. v. Healey, 160 U. S. 136, 146.
> Townsend v. Little, 109 U. S. 504.
> Ex Parte, Crow Dog, 109 U. S. 556, 570.
> Great Northern R. R. Co. v. U. S., 155 Fed. 945, 960, 961.

We therefore submit that the Acts of 1887 and 1888, denying all appeal from the granting of an order to remand were not repealed or in any way modified by the changes in the present certiorari law, and that because of the statutory inhibition against "any prolongation of the controversy" the judgment of the Circuit Court of Appeals ordering a remand to the State Court can not be reviewed in this Court.

STATEMENT OF CASE.

Although confident that our challenge to the jurisdiction of this court, as set out in the preceding paragraph of this brief, is good, we desire to submit a very brief statement of the case itself, and an equally brief argument in support of the decision of the Circuit Court of Appeals and against the granting of the petition for Certiorari in the event this Court shall hold that it has jurisdiction to review, by certiorari, the granting of an order to remand to the State Court.

Ruff, the respondent, brought an action against Gay, Receiver, to recover damages for the wrongful homicide of his minor son. This action was brought in the State Court having jurisdiction. (Rec. p. 1.) Gay was the Receiver of the Savannah and Atlanta Railway, a Georgia corporation (Rec. p. 1) and Gay was appointed Receiver of Railway by the U. S. District Court of the Southern District of Georgia in the exercise of its equity powers. (Rec. p. 1.) This action was "in respect to acts and transactions of the Receiver in carrying on the business connected with the Railway property (Rec. p. 1). It was authorized, without previous leave of the Court appointing the Receiver under the provisions of the Act of March 3, 1887, Section 3 (28 U. S. C. A. Section 125.) Thereupon the Receiver removed the case to the United States District Court in which he had been appointed, said removal being taken under the provisions of Section 33 of the Judicial Code as amended by the Act of August 23, 1916 (28 U. S. C. A. Section 76). Respondent then made a timely motion to remand the case to the State Court (Rec. p. 9), contending that the Act of 1916 had in no way repealed the Act of 1887 and that properly construed the Act of 1916 only authorized removals to the Federal Court where the effort was to subject him individually, in his person or estate, to Civil or Criminal liability in the State Court, and not merely to charge the property of which he was Receiver with liability.

The motion to remand was overruled by the District Court and following the dismissal of his action in that Court respondent took an appeal to the Circuit Court of the United States for the Fifth Circuit. In that Court the appeal of respondent was sustained and the District Court was reversed, the Circuit Court of Appeals directing the District Court to set aside the order dismissing the case and to remand the same to the State Court. (Rec. p. 30.)

That judgment petitioner seeks to review by Writ of Certiorari.

QUESTION PRESENTED.

The question is whether a suit against a Receiver appointed by a Court of the United States, to recover damages from the receivership estate for the negligence and torts of his agents in the operation of the property committed to his charge can be removed to the United States Court appointing such Receiver on the sole ground that the suit is against a Receiver of the Federal Court, and for that reason alone, diversity of citizenship and all other federal questions being absent; in other words whether or not the Act of 1916, amending Section 33 of the Judicial Code, applies only to actions and proceedings brought personally against the receiver and seeking to hold him liable as an individual, or shall be given the broader construction contended for by petitioner, and authorizes the removal of all suits where the sole effort is to hold the property in receivership liable.

ARGUMENT.

The Court of Appeals of the Fifth Circuit held that Section 33 of the Judicial Code, as amended by the Act of August 23, 1916, merely conferred on Receivers, as officers of the Federal Court the power to remove to the Court appointing them all actions and proceedings that sought to charge them with individual liability on account of Acts done in their official capacity, and that properly construed

the Act of August 23, 1916, did not authorize the removal to the federal Courts of Actions and proceedings the object and purpose of which was merely to charge the estate in receivership, or the Corporation, with liability. (Record pp. 25-30.)

The construction given by the court below to Section 33 as amended by the Act of 1916 is the most natural and reasonable construction of the Statute that is possible. If the statute is to be given the construction contended for by petitioner, then it is thrown in irreconcilable conflict with the Act of March 3, 1887, and August 13, 1888 (28 U. S. C. A. Section 125) and must necessarily repeal those statutes by implication.

Those acts authorized suits to be brought against a Receiver appointed by the Courts of the United States without the previous leave of such Courts "in respect of any act or transaction of his in carrying on the business connected with such property."

28 U. S. C. A. Section 125.

After considerable diversity of opinion in the several district and circuit courts of the United States, the Supreme Court of the United States finally held (1900) that a suit brought in a state court under its terms was not removable to the Federal Court either as a suit arising under the Constitution and laws of the United States or because the receiver in such case was one appointed by a court of the United States.

Gableman v. Peoria Ry. Co., 179 U. S. 335 (45 L. Ed. 220).

After stating that the purpose of the statute was to allow a citizen the right to sue in the local (state) courts and not to compel him to litigate "at a distance, or in any other forum," the opinion of Chief Justice Fuller in that case states:

"The object of the section is manifest, and it is equally plain that that object would be open to be defeated if the receiver could remove the case at his volition. The intention to permit this to be done, cannot reasonably be imputed to Congress, and, moreover, such a right would be inconsistent with the general policy of the act."

In passing the Act of August 23, 1916, amending Section 33 of the Judicial Code, Congress did not intend to affect, in any way the Acts of 1887 and 1888 authorizing certain suits to be brought in the state courts. As pointed out the Circuit Court of Appeals in its opinion (Record, p. 29) the House Report on the bill that subsequently became the Act of August 23, 1916, contained this significant statement: "The statute, with the proposed Amendment, does not extend in any way the jurisdiction or the powers of the Courts of the United States." And yet to give the Act of 1916 the construction contended for by petitioner would greatly extend the powers and jurisdiction of the Courts of the United States by enabling all receivers appointed by those courts to arbitrarily remove from the State Courts the numerous cases embraced with the terms of the Acts of 1887 and 1888, by authorizing the removal of these suits (usually tort actions) to the federal courts for trial, thus reversing a policy that had even then been followed for almost thirty years with respect to these cases.

Besides, to give to the Act of August 23, 1916, the construction contended for by petitioner is to give to Receivers of the Courts of the United States a broader protection than was ever given to the Revenue officers under the original text of Section 33 of the Judicial Code. Those officers were only protected against the effort to hold them *individually liable*, in person or estate, and acts done in the execution of their duty as federal officers or under color of such office.

Maryland v. Soper, 270 U. S. 9.
Stacey v. Chicago Ry. Co., 16 Fed. (2d) 609.

To give the Act of August 23, 1916, the construction placed upon it by the Circuit Court of Appeals of the Fifth Circuit, harmonizes that Act with the Acts of 1887 and 1888. To give it the construction contended for petitioner necessarily effects the repeal by implication of the Acts of 1887 and 1888.

We hold the following propositions as so axiomatic as to require no citation of authority, although abundant citation on each of them could be furnished, both from the opinions and decisions of this Court, as well as from many others:

1. Repeal of Statutes by implication is never favored.

2. Repeal by implication results only where the provisions of the more recent act are in clear and irreconcilable conflict with those of the act so repealed.

3. To effect such a repeal judicial construction is required, and in such cases the attempt is to discover and declare the legislative intent.

4. The two acts between which there is apparent conflict must be so construed as to harmonize with each other, if such be possible.

5. The rule against repealing a statute by implication is especially applicable where the prior law relates to a particular class of cases, and the subsequent law is more general in its terms, although broad enough to cover the prior statutes.

Measured by all of these tests the construction of the Act of August 23, 1916, as repealing the Acts of 1887 and 1888, contended for by petitioner, is untenable; and that set up by the Circuit Court of Appeals of the Fifth Circuit is reasonable and tenable.

The opinion of the Circuit Court of Appeals of the Fifth Circuit (Record pp. 25-30) is before the court and its

strength and clearness have rendered it unnecessary for respondent to go more fully into the merits of these contentions, in this brief.

SUMMARY.

Respondent insists:

1. That this court is without jurisdiction to grant the Writ of Certiorari in this cause, because of the statutory inhibition herein set out.

2. That even if the court shall be of opinion that the writ lies, in this case the decision complained of is so clearly right that there ought to be no further review of the question, and the Writ of Certiorari should be denied.

Respectfully submitted,

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